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Language, History and the Lawyers' Directives

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Abstract The author highlights the historical context of the creation of the Services and the Establishment Directives and the different concepts of the legal profession(s) in the Member States. With the accession of the UK and Ireland to the then European Communities, the European legislator had no longer to deal with a more or less uniform understanding of the role and function of the legal profession. The different concepts are reflected in the different notions used, or formerly used, in the different European jurisdictions. These jurisdictions also differ in their understanding of the legal and judicial, or the legal and notarial, professions as separate or reconcilable careers.

Keywords Establishment Directive · Services Directive · Lawyers · Judges · Notaries

1 The Notion of the Legal Profession as a Challenge for European Regulation

John Toulmin made a very important contribution to the evolution of the legal profession in Europe. As President of the Council of Bars and Law Societies of the European Union (the CCBE), and earlier as leader of the UK delegation, he brought to a successful conclusion the inter-professional negotiations that led to the directive on the right of establishment for lawyers (the Establishment Directive).[1] Although

[1] Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77 of 14 March 1998, p. 36.

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the directive did not entirely put an end to the problems that had dogged the negotiations,[2] it represented a workable compromise.

Many of the problems were due to linguistic and historical differences. The earlier directive on lawyers' services (the Services Directive)[3] overcame the differences essentially by ignoring them. The Establishment Directive had to deal with them in greater detail. But although the problems were solved or at least ignored for the purposes of the directives, the potential scope for misunderstandings is still there. They begin with the problem of identifying the 'profession' to which the directives apply.

Strictly speaking, a 'profession' (*profession, Beruf*) is an occupation involving some degree of skill or vocation by which people earn their living. In English the word 'profession' acquired social overtones being generally contrasted with 'trade', and was normally confined to the so-called learned professions (the Church, the law and medicine).[4] Organisation, regulation and discipline have come to be seen as identifying features of a profession. Special qualifications, usually involving examination, are required for entry and after entry the members of the profession are subject to regulation and discipline.

Thus far apart from social overtones, there is no great conceptual difference between English and other languages. In broad terms, 'the legal profession' means an identifiable group of people whose business is the practice of the law, who have acquired a special qualification and are subject to continuing professional rules and discipline.

But who are the members of this group of professionals? This was a question that seemed to raise relatively few difficulties at the time when the Commission was drafting the Services Directive before the accession of Denmark, Ireland and the United Kingdom in 1973.

In the original six Member States, the professional titles *Avocat, Avvocato, Advocaat* and *Rechtsanwalt* define more or less precisely what a lawyer does and, equally importantly, what he or she does not do. A French *avocat* is essentially an independent lawyer in private practice and, correspondingly, is not a judge, government lawyer, in-house counsel (*conseil d'entreprise*) or notary. The same was broadly true, *mutatis mutandis*, in the other five Member States.

So it was possible for the Commission to propose a Services Directive 'to facilitate the provision of services by *avocats/avvocati/advokaten/Rechtsanwälte*'. The titles by themselves seemed sufficient to identify the professions that were involved. The simplicity of this approach concealed important differences between the profession of *Rechtsanwalt* in Germany and the professions in the other five Member States. Also, until the judgement of the Court in *Reyners*[5] there was uncertainty as

[2] See Case C-168/98 *Luxembourg v Parliament and Council*, [2000] ECR I-9131.

[3] Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ L 78 of 26 March 1977, p. 17.

[4] The word 'professional', on the other hand, has no particular social connotation. A professional footballer earns his living by playing football, an amateur is thought to do it for fun.

[5] Case 2/74 *Reyners v Belgium* [1974] ECR 631.

to whether Article 55 of the EEC Treaty[6] excluded the professions from its scope. These questions had not been resolved by the time of the accession of the U.K. and Ireland.

2 Two Legal Professions

The entry of countries from the common law tradition presented new problems for two reasons. The first and most obvious reason was the existence in those countries of two 'professions' of lawyers in private practice rather than one: barristers (advocates in Scotland) and solicitors. The second reason was that, in the countries of the common law tradition, 'the legal profession' includes all those who make their living through the practice of law in the widest sense, whether as barristers, advocates, solicitors, attorneys, in-house counsel or judges.

The historical origins of the division between barristers and solicitors corresponded to a separation of functions that characterised the profession in most countries of Europe. Nearly all legal systems have recognised at least two possible forms of relationship between the lawyer and the client.

In the first type of relationship, the lawyer is entirely independent of the client and is not bound to do what the client wishes or instructs. Correspondingly, the lawyer's acts do not bind the client. What the lawyer offers is knowledge, skill and experience, either as an adviser or as a pleader in court.

In the second type of relationship the lawyer acts for the client in such a way that his acts are treated in law as the acts of the client. What the lawyer does binds the client, and what the client instructs (provided it is legal and ethical) the lawyer is bound to do. In English terms, the lawyer is the agent of the client.

Today the distinction between these two types of lawyer-client relationship is blurred. It is still important for many purposes to know whether the act of the lawyer is to be treated in law the act of the client or not. But there are comparatively few countries where the distinction is still carried so far as to mark a continuing point of difference between two separate professions.

Nevertheless, the distinction is reflected in the professional titles used in some of the Member States, as shown in this table with the titles in current use in capital letters:

ENGLAND & WALES IRELAND	BARRISTER	SOLICITOR Attorney Proctor
SCOTLAND	ADVOCATE	SOLICITOR Procurator Law Agent

[6] Now Article 51 TFEU.

FRANCE	AVOCAT	AVOUÉ Procureur
GERMANY	Advokat	ANWALT
ITALY	AVVOCATO	Procuratore
NETHERLANDS	ADVOCAAT	Procureur
PORTUGAL	ADVOGADO	SOLICITADOR
SPAIN	ABOGADO	PROCURADOR

It will be seen that in the second column of the table, with the exception of England & Wales and Ireland, the title 'advocate' is common to all countries. As the Latin name (*ad-vocatus*) implies, the advocate was someone called upon to help the litigant or accused person in court, offering a specialist skill in pleading acquired through training in rhetoric, study of the law and experience in the courts. In the choice of words, the advocate did not bind the client, nor did the wishes of the client bind him. The advocate's function was to 'assist' the client (from the Latin *ad-sistere*, to stand beside).

The third column shows a greater variety of titles but, with the exception of *avoué* (from the same root as *avocat*), they have this in common, that in origin the title is a reflection of function: someone who takes care of matters for someone else (solicitor, procurator), someone appointed (attorney) or someone exercising a power of behalf of someone else (*Anwalt)*. In the context of court proceedings, the function of the procurator or equivalent was to 'represent' the client before the court, either because the client could not be physically present or did not wish to be, or because the client's presence was unnecessary. The act of the procurator was the act of the client.

The difference in function is reflected in the distinction in French terminology between *assister* and *représenter* and explains why Article 19 of the Statute of the Court of Justice provides that:

> 'The Member States and the institutions of the Union shall be *represented* before the Court of Justice by an agent (*agent*) appointed for each case; the agent may be *assisted* by an adviser (*conseil*) or a lawyer (*avocat*).'

The separate functions of the two professions were reflected in the organisation and rules governing the professions. Advocates were organised in Bars but could plead in courts outside the geographical province of their Bar. Procurators were organised in Chambers and their practice was strictly confined to a geographical area or even to a particular court. Advocates were free to fix their fees, while the fees of procurators were subject to regulation by government or by the courts.

In most countries, the professions exercising these separate functions have been 'fused', normally by suppressing one or other of them. But the differences remain in some respects. Thus in Germany where the profession of *Advokat* was suppressed in 1879, the organisation and rules of the profession of *Rechtsanwalt* are essentially

those of the profession of procurator: organisation in Chambers (*Kammern*) related to geographical areas and courts and a regulated fee structure.[7]

Even before the accession of the U.K. and Ireland, the differences in the way in which the professions had developed and their different organisation and rules had caused difficulties in the adoption of the proposed Services Directive. While it seemed normal that an *avocat* should be able to plead in the courts of another country (subject where necessary to the intervention of an *avoué*) such an idea was inherently incompatible with the geographical and hierarchical organisation of the *Rechtsanwaltskammern* in Germany. Similarly there were problems about the rules relating to fees. The proposal that a lawyer providing services in another country should be bound by the rules of his or her home Bar and the host Bar was unduly simplistic.

In so far as the function of procurator or *avoué* survives, either separately (as in the case of the *avoués près la Cour d'appel* in France) or as an aspect of the work of the single fused profession, this is recognised in specific provisions of the Services and Establishment Directives requiring a lawyer from another Member State, where appropriate, 'to work in conjunction with an *avoué* practising before [the judicial authority in question]'.[8] More generally, the Services Directive provides in rather vague terms that a lawyer engaged in court activities is bound to observe the rules of the host Member State 'without prejudice to his obligations in the Member State from which he comes'.[9] The Establishment Directive is more specific.[10]

3 Lawyers, Notaries and Judges

In addition to the professions of advocate and procurator, many countries of Europe have a separate profession of notary (the 'Latin notary') concerned with the drawing up, authentication and registration of deeds relating especially to the transfer of interests in land or succession on death. In some German *Länder*, the profession of *Notar* can be combined with that of *Rechtsanwalt*, so again there was a question as what to lawyers from those *Länder* should be permitted to do in Member States where the professions were separate. This explains the provisions in the Directives which permit Member States to reserve to 'prescribed categories of lawyers the preparation of formal documents creating or transferring title to administer estates of deceased person and the preparation and the drafting of formal documents creating or transferring interests in land'.[11]

[7] The professions in Italy were reformed under the Fascist régime in 1933 and *avvocati* were subjected to some of the rules governing *procuratori* – notably (until 2006) as regards fees. The profession of *procuratore legale* was suppressed in 1997. Previously, a lawyer was admitted first as a *procuratore* and could later become an *avvocato.* The Italian fee system, abolished in 2006, was in issue in Case C-35/99 *Arduino* [2002] ECR I-1529 and Joined Cases C-94/04 *Cipolla v Fazari* and C-202/04 *Capoparte v Meloni* [2006] ECR I-11421.

[8] Services Directive, *op. cit.*, Article 5 second indent, and Establishment Directive, *op. cit.*, Article 5(3).

[9] Services Directive, *op. cit*., Article 4(2).

[10] Establishment Directive, *op. cit*., Article 6.

[11] Services Directive, *op. cit.*, Article 1(1), second paragraph, and, in slightly different terms, Establishment Directive, *ibid.*, Article 5(2).

The accession of the U.K. and Ireland brought a new dimension to the existing problem of defining the profession to which the proposed directive was to apply. While the professions of barrister and solicitor were in origin analogous to those of the advocate and procurator in the original Six, the way in which they had developed was different. By the mid-twentieth century, the professional titles were no longer sufficient, by themselves, to identify what barristers and solicitors were, or were not, entitled to do.

While the profession of barrister was still largely confined to pleading and legal consultancy, the profession of solicitor had greatly extended the functions of the 'agent' to include management of clients' affairs (including holding and managing clients' money), negotiation and various other aspects of business – activities that were incompatible with, for example, the profession of *avocat* in France. In the absence of a separate profession of notary, the drafting of deeds relating to interests in land (conveyances) and wills was a regular function of solicitors and to some extent also of barristers.[12]

The most crucial difference between the barrister and the solicitor was that the barrister did not deal directly with the client but acted exclusively on the 'instructions' of the solicitor as the clients' agent.[13] The difference can perhaps be explained by saying that in the countries of the civil law tradition the separation between the professions was vertical, each profession having a defined function to the exclusion of the others; in the U.K. and Ireland, the separation was horizontal.

The title of barrister or solicitor is not necessarily any indication of what a lawyer does for a living. In a sense, the title is a form of professional diploma or qualification rather than a description of professional activity. Once admitted as a barrister or solicitor, the lawyer may be in private practice in the same way as an *avocat*, or be employed as in-house counsel or as a lawyer in national or local government. In-house counsel and government lawyers serve on the professions' governing and regulatory bodies, and share a community of outlook and a common professional bond with their colleagues in private practice. This, incidentally, explains why in-house lawyers from the common law countries have difficulty in understanding the logic of the decisions of the European Court of Justice in *AM&S* and *Akzo Nobel*.[14]

In the common law countries the judiciary are chosen from those who are qualified as barristers or solicitors (or attorneys in the U.S.A.). In a case concerning the rule forbidding attorneys to advertise,[15] Justice Blackmun of the US Supreme Court said:

> 'We recognize, of course, and commend the spirit of public service with which the profession of law is practiced and to which it is dedicated. The present Members of this Court, *licensed attorneys all*, could not feel otherwise.'

That is not a statement that would, or indeed could, have been made by a judge in the countries of the civil law tradition. Judges in those countries are, by definition,

[12]The City of London Notaries and the Notaries Public in Scotland are not 'Latin notaries'.

[13]This rule has now been partly departed from – more so in England than in Scotland.

[14]Case 155/79 *AM & S Europe Ltd v Commission* [1982] ECR 1575; and Case C-550/07P *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, judgement of 14 September 2010, not yet reported.

[15]*Bates v State Bar of Arizona*, 433 US 350 (emphasis added).

not members of the same profession as *avocats* or their equivalent. Judges in the common law world, on the other hand, do not cease to be barristers, solicitors or attorneys because they have been appointed to be judges. In the English Inns of Court, for example, they continue to sit without distinction at the same tables as practising barristers.

So, merely to say that someone is a barrister or solicitor does not necessarily tell one anything about what they do, since they may be engaged in many forms of activity as a lawyer or none. A distinction has to be made between 'practising' and 'non-practising' barristers and solicitors. This explains why the English text of the directives is more difficult to understand than the text in other languages, starting with the fact they have to use the generic word 'lawyer' as opposed to the profession-specific words *avocat*, etc. The separate existence of two professions also explains the special rules relating to practice in the UK and Ireland by lawyers from other Member States.[16]

The directives have not laid to rest all the problems inherent in cross-frontier legal practice in the European Union. Historical, structural and linguistic differences remain and continue to give rise to cases like *Gebhard, Morgenbesser, Peśla* and *Koller*.[17]

While the directives have produced a workable compromise, they cannot eliminate all the consequences of language and history. Perhaps it would be as well always to keep in view what Sybille Bedford wrote in 1961:

> 'The law, the working of the law, the daily application of the law to people and situations, is an essential element in a country's life. It runs through everything; it is part of the pattern like the architecture and the art and the look of the cultivated countryside. It shapes and expresses a country's modes of thought, its political concepts and realities, its conduct. One smells it in the corridors of public offices, one sees it on the faces of the men who do the customs. It all hangs together whether people wish it or not, and the whole is a piece of the world we live in.'[18]

[16] Services Directive, *op. cit*., Article 4.3, Establishment Directive, *op. cit.*, Article 3.3.

[17] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, Case C-313/01 *Morgenbesser* [2003] ECR I-13467, Case C-345/08 *Peśla*, judgement of 10 December 2009, not yet reported, Case C-118/09 *Koller*, judgement of 22 December 2010, not yet reported.

[18] Sybille Bedford *The Faces of Justice* Collins, London, and Simon & Schuster, New York, 1961, page 83.